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No. 90-848

In The

Supreme Court of the United States

October Term, 1990

KENNETH HILTON,

Petitioner,

v.

SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF ON THE MERITS BY PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Does the opinion of the South Carolina Supreme Court in this case conflict with decisions of this Court holding that the federal statutory regulation of this Nation's railroads, including the FELA laws, pervasively pre-empt the field and apply to state-operated railroads?

2. Does a state that voluntarily engages in interstate railroad commerce thereby consent to the applicability of the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*?

3. Are the remedies provided by the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, available to employees injured while working in furtherance of interstate commerce for railroads owned and operated by a state?

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CITATION OF OPINIONS BELOW

The opinion of the Supreme Court of South Carolina, relying upon *Freeman v. S.C. Public Ry. Comm.*, 393 S.E.2d 383 (1990) (App. 9),[1] is reported as *Hilton v. S.C. Public Ry. Comm.*, a Memorandum Opinion (App. 7), pursuant to that court's "Rule 23"; we have been unable to find this opinion in the Southeastern (2d) Reporter.[2]

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the Opinion of the South Carolina Supreme Court is July 20, 1990 (App. 7). The date of denial of a timely Petition for Rehearing was September 4, 1990 (App. 1). The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States.

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[1] All appendix references are to the appendix to the Petition for Writ of Certiorari.

[2] *Freeman* being the only "reported" decision, reference to the language in the Court below will be directed to that decision (393 S.E.2d 383).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 2, of the U. S. Constitution:

> The Congress shall have Power . . . To regulate Commerce with foreign nations and among the several States, and with the Indian Tribes.

45 U.S. Code, Section 51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered

> as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Plaintiff originally filed his action in the United States District Court. Following the decision in *Welch v. Texas Dept. of Highways and Public Trans.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), Plaintiff voluntarily dismissed that action and refiled his claim in the appropriate state court in South Carolina (App. 33). Plaintiff's Complaint there alleged that he was injured while employed by an interstate railroad and that he was entitled to the remedies provided by 45 U.S.C. §51 *et seq*. The Defendant filed a Motion to Dismiss, claiming that the state-operated railroad was not subject to the provisions of the FELA (App. 31). The trial court granted the Motion to Dismiss (App. 19). Plaintiff timely filed a Motion for Reconsideration in the proceeding, but the rehearing was denied by the trial court (App. 15). A timely appeal was then filed in the South Carolina Supreme Court. That Court affirmed (upon the authority of its decision involving the same issue, decided several weeks earlier) the dismissal of Plaintiff's Complaint, holding that the provisions of 45 U.S.C. §51 *et seq*. did not apply to the state-owned railroad (App. 7, 9). A timely Petition for Rehearing (App. 2) was denied by the South Carolina Supreme Court (App. 1). All rulings in the Supreme Court of South Carolina were predicated upon its earlier disposition of a similar case: *Freeman v. South Carolina Public Railways Comm.*, 393 S.E.2d 383 (1990).

SUMMARY OF ARGUMENT

This is *not* an Eleventh Amendment case; it involves *not* the federal judicial power, but the Congressional power to require State courts to entertain FELA actions upon the same substantive basis that governs FELA actions in the federal courts.

Conflict is apparent, and tacitly conceded by the Supreme Court of South Carolina, with *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). Conflict exists with *Welch* also, as well as with other cases involving the FELA. The same needs for uniformity within, and pervasive pre-emption of, the field of rail interstate commerce exist today as were prominent factors in the earlier cases establishing the applicability of the Congressional rail legislation to "all" rail carriers (including those operated by States).

When South Carolina created its Public Railways Commission in 1969, *Parden* had already made it clear that participation in interstate rail commerce would subject the South Carolina operation to the FELA. Whatever sovereign immunity concept the Court may apply here (if *any* is deemed applicable), that immunity can be surrendered or waived by the voluntary action of the State in pursuing activities:

> (a) Squarely within a pervasively regulated sphere of interstate commerce;
>
> (b) Unconnected with any federal grants or fundings; and
>
> (c) For profit, and far beyond the historic governmental activities commonly associated with any immunity concept.

The FELA simply affords an injured employee to be made whole; no penalty or punitive damages are authorized.

The FELA remedy, heretofore available to employees of state railroads, is in jeopardy only if this Court's judicial gloss on the Eleventh Amendment is not:

> (a) Excepted, in light of undeviating precedent, congressional acquiescence and the continuing need for uniform and pervasive regulation of rail interstate commerce; or
>
> (b) Accommodated, by finding that state courts may be required to hear FELA cases even though a federal court would have no jurisdiction – especially in this case where Congress had the explicit authority to subject States to FELA accountability and where the State surrendered or waived any immunity by electing to venture into interstate rail commerce; or
>
> (c) Eliminated, by overruling *Hans v. Louisiana*, or at least restricting its precedential value to its precise holding – thus discarding subsequent expansion of that decision.

ARGUMENT

Introduction

"[T]he Eleventh Amendment does not apply in state courts" *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 63-64 (1989). As recognized by the South Carolina Supreme Court in its *Freeman* opinion, the Amendment "does not bar suits against a State in State Court," 393 S.E.2d at 384 (fn. 3) (App. 12). "The language of the Eleventh Amendment gives us no hint that it limits *congressional* authority;

it refers only to the '*judicial* power' . . . " *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 18 (1989) (Plurality opinion).[3]

[Issue I]

> Does the opinion of the South Carolina Supreme Court in this case conflict with decisions of this Court holding that the federal statutory regulation of this Nation's railroads, including the FELA laws, pervasively pre-empt the field and apply to state-operated railroads?

By recognizing that *Parden* was only partially overruled by *Welch*, indeed that *Welch* "left open the second holding of *Parden*", the South Carolina Supreme Court acknowledged its ruling to be in conflict with *Parden*, 393 S.E.2d at 384 (fn. 4) (App. 13). By ignoring the fact that five members of this Court specifically re-affirmed the viability of a cause of action against states under the Jones Act, (see *e.g.*, concurring opinion of White, J., 483 U.S. at 495) the South Carolina Court ruled contrary to *Welch*. We shan't belabor the conflict issue, but will note our contention that the opinion below is totally at odds with the rationales of *U.S. v. California*, 297 U.S. 175 (1936), *California v. Taylor*, 353 U.S. 553 (1957) and *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982).

We assume the conflict issue provided the most obvious key to unlock the door to this Court's certiorari jurisdiction, but we doubt the wisdom of further argument on this self-evident proposition.

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[3] Absolute sovereign immunity exists only where a forum and the source of the statute are identical. *Nevada v. Hall*, 440 U.S. 410, 416 (1979).

[Issue II]

> Does a state that voluntarily engages in interstate railroad commerce thereby consent to the applicability of the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*?

Even the Eleventh Amendment's explicit "bar" to federal court jurisdiction may be waived or surrendered by a state. *Clark v. Barnard*, 108 U.S. 436 (1883).

It is no surprise, therefore, that any claimed immunity with *less* than explicit constitutional status may likewise be lost by way of waiver, surrender or consent. *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275 (1959); *Parden v. Terminal Ry. of Al. Docks Dept.*, 353 U.S. 553 (1957).

By Act No. 456, effective July 14, 1969, the South Carolina Public Railways Commission was created; simultaneously the South Carolina State Ports Authority was directed to "transfer to the commission its common carrier Class 2 switching operations that are currently under the jurisdiction of the Interstate Commerce Commission." The South Carolina Commission was given the duties to "operate, maintain and control the tractors and equipment transferred to it – and be governed by the rules and regulations of the Interstate Commerce Commission by virtue of the Class 2 certificates issued to the Ports Utilities Commission and the Port Terminal Railroad of South Carolina" (1969 Stat. at Large 810, 812). Those provisions were amended in 1975, to include within the commission's authority "the power to sue and be sued"[4]

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[4] Under South Carolina law, the power to sue and be sued does not constitute a waiver of sovereign immunity for tort actions. See, Order (on Motion for Reconsideration) (App. 16). [Reference to South Carolina laws hereafter will be to the codified provisions.]

(Act No. 232, 1975 Stat. at Large 321, 322). These provisions are now codified in §59-19-10, §59-19-30 and §59-19-40, Code of Laws of South Carolina, 1976.

Coming into the field of interstate rail commerce after *Parden* was the law of the land, South Carolina accordingly has submitted – not to federal judicial power but to the pervasive regulatory ambit of Congress – in two fashions, each of which this Court has acknowledged to be efficacious as a surrender, waiver or consent to yield to federal authority:

> A. By "the plan of the convention" a state's alleged sovereignty may be surrendered.
>
> *Principality of Monaco v. State of Mississippi*, 292 U.S. 313 (1934).
>
> In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989) the ratification of the Commerce Clause was held to be an effective surrender to the power of Congress to regulate state action. (Plurality opinion.)
>
> B. In *Parden* the voluntary undertaking of interstate commerce by rail was held to be a consent to federal regulation. (377 U.S. at 192).

After *Parden*, South Carolina was on notice, *ab initio*, that its rail scheme would constitute its consent to coverage by federal law, including the FELA. Accordingly, this case does *not* involve a state "unable directly to remedy a judicial misapprehension" regarding the abrogation of any alleged immunity (*Port Authority Transportation Hudson Corp. v. Feeney*, 495 U.S. at ___, 109 L.Ed.2d at 272). The fact that *Parden* was later overruled, on the issue of federal court jurisdiction, (a "constitutional" issue to be sure) should not, *ipso facto*, negate its precedent relating

to a consent to the laws of the United States regulating rail commerce – a finding (whether "misapprehension" or not) that placed South Carolina on clear notice of the result of its action.[5]

This case does *not* present the scenario before the Court in *Will* (491 U.S. 58, 65):

> (A) Here there are no "historic powers of the States" being pre-empted;
>
> (B) Here there is no imposition of a condition on the grant of federal moneys.

As to any perceived "sensitive areas . . . affecting the federal balance" (491 U.S. at 65) this Court long ago mandated that states yield to federal law in deference to the FELA. The opinion announcing a unanimous decision in *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430 (1990) is laden with citations of FELA opinions establishing "supremacy" of the federal law and the obligations of states to entertain suits brought under those laws (___ U.S. ___, 110 S.Ct. at 2439-2442). [The FELA has been the "most fertile source of Supreme Court decisions construing the duty of state courts to assume their ordinary jurisdiction to enforce federal law in a nondiscriminatory fashion." *Wolcher*, "Sovereign Immunity and the Supremacy Clause: Damages against States in Their Own Courts for Constitutional Violations." 69 Cal. L. Rev. 189, 239 fn. 16 (1981).] These FELA decisions emphasize the reluctance of states to accord supremacy, the machinations

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[5] The various references to the "Interstate Commerce Commission" in the enabling legislation clearly reveal an awareness by South Carolina of the pervasive scope of federal power.

(under the guise of local law) to avoid supremacy and the steadfast insistence by this Court that the Congress has pervasively pre-empted the field to the point where states must provide a forum for FELA cases in all but the rarest of events. *Garcia v. San Antonio Metro. Trans. Authority,* 469 U.S. 528 (1985) recognizes the limits placed upon notions of state sovereignty by the Constitution (at 548-549) and denies the existence of any "license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause" (at 550).

[Issue III]

> Are the remedies provided by the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, available to employees injured while working in furtherance of interstate commerce for railroads owned and operated by a state?

A.

When last discussed by the Court, five Justices expressly affirmed the existence of a Jones Act/FELA remedy for injured employees of state-operated entities, notwithstanding that the remedy could not be enforced in a federal court, *Welch v. Texas Dept. of Highways & Public Transportation,* 483 U.S. 468 (1987); only one member of the Court apparently disavowed the viability of this remedy (483 U.S. at 496, Scalia J., concurring). Less than a year ago, the Court unanimously ruled that a bi-state agency had consented to federal jurisdiction for the adjudication of rights afforded by the remedial provisions of the Jones Act/FELA. *Port Authority Transportation Hudson Corp. v. Feeney,* [PATH] 495 U.S. ___, 109 L.Ed.2d 264

(1990). True, the "remedy" aspect was not addressed directly in *PATH,* but its solid reliance upon *Petty v. Tennessee-Missouri Bridge Comm.,* 359 U.S. 275 (1959) casts the *PATH* decision in a light most favorable to the holding in *Petty* that the federal law applied to states (indeed the *PATH* controversy would have been moot absent the *applicability* of the Jones Act[6] – unless the court is to be understood as implying that a state did "consent" to be sued under a law that does not apply to the state!). Even more recently, *Parden* has been relied upon for the principle that the Commerce Clause, when implemented by legislation, vitiates any state immunity based upon sovereignty. *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989) (Plurality opinion).

If *Petty* and *Parden* are still viable, (and if *PATH* was not an advisory opinion, or *dicta*) then tension appears inevitable with the statutory construction analysis articulated by the Court in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985) and its progeny. *See, e.g. Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989) and *Dellmuth v. Muth,* 491 U.S. 223 (1989). No decision has yet applied the *Atascadero* doctrine to preclude Congress from requiring a state to entertain, *in its own courts,* a cause of action created by the implementation of the Commerce Clause. This precise scenario was envisioned before *Atascadero,* however, in *Employees of Dept. of Public Health & Welfare v.*

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[6] The concluding paragraph of the Court's opinion is broadly couched, stating that *consent* establishes a "waiver of *any* Eleventh Amendment immunity *that might otherwise bar*" PATH's amenability to suit, ___ U.S. at ___, 109 L.Ed.2d at 274 (emphasis supplied).

Missouri, 411 U.S. 279, 298-299 (1973) (Marshall, J., concurring opinion):[7]

> This is not to say, however, that petitioners are without a forum in which personally to seek redress against the State. Section 16(b)'s authorization for employee suits to be brought "in any court of competent jurisdiction" includes state as well as federal courts. See *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 2287, 92 S.Ct. 859, 31 L.Ed.2d 165 (1972). As I have already noted, Congress has the power to lift the State's common-law immunity from suit insofar as that immunity conflicts with the regulatory authority conferred upon it by the Commerce Clause. Congress has done so with respect to these state employees in its 1966 amendments to the FLSA; by those amendments, Congress created in these employees a federal right to recover from the state compensation owing under the Act. While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. See *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947). See also *General Oil Co. v. Crain*, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (1908). For Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution, see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 339-340,

[7] The majority opinion recognized that, "[a]rguably," state court jurisdiction would lie so as to avoid the existence of "a right without any remedy", but restricted its consideration solely to "judicial power" of federal courts. 411 U.S. at 287.

> 4 L.Ed. 97 (1816). Thus, since federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy, see *Testa v. Katt, supra*, 330 U.S., at 392-394, 67 S.Ct. at 813-815; Second Employers' Liability Cases, 223 U.S. 1, 57-58, 32 S.Ct. 169, 178, 56 L.Ed. 327 (1912).
>
> I see our decision today, then as nothing more than a regulation of the forum in which these petitioners may seek a remedy for asserted denial of their rights under FLSA. At first blush, it may seem hypertechnical to say that these petitioners are entitled personally to enforce their federal rights against the State in a state forum rather than in a federal forum. If that be so, I think it is a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism.

Id. 411 U.S. at 298-299, 93 S.Ct. at 1625.

Granted, *Will* is a case involving state court jurisdiction over a federally-created cause of action; it dealt with federal law derived from the Fourteenth Amendment, however, whereas we now deal with law promulgated under the commerce power. [We again emphasize that our case does *not* involve the judicial power of the United States, and that *Will* specifically tells us "the Eleventh Amendment does not apply in state courts", 491 U.S. at 64.] This difference in the source of federal power is highlighted by *Will's* concern over the "historic powers of the States" or the conditional "grant of federal moneys" (491 U.S. at 65). Also, see *Employees*, 411 U.S. at 284-285, emphasizing the non-"proprietary" aspect of state functions involved there, and distinguishing *Parden* as a situation of "dramatic circumstances" in which a "rather isolated state activity" was conducted *for a profit*.

Employees further recognized the appropriate result of *Parden:* "to make a state employee whole" (491 U.S. at 286). Kenneth Hilton can only be "made whole" if this Court preserves his cause of action, in state court, against his employer. He is specifically excluded from the South Carolina worker's compensation laws ["This title shall not apply to railroads, railroad employees . . . " § 42-1-350] as well as from the South Carolina Tort Claim law [§ 15-78.20] that only became effective "forward in prospective fashion" on July 1, 1986 [Hilton was injured in March, 1986]. By virtue of FELA supremacy in the field of interstate rail operations the South Carolina "little FELA" [§ 58.17-3720] is of no moment. Little doubt exists that this plight stems primarily from the universal understanding that FELA exclusively applies to Kenneth Hilton and his fellow employees.

Significantly, however, by permitting *some* tort suits against the state, South Carolina now must accept FELA cases against the state, *Testa v. Katt*, 330 U.S. 386 (1947). Also, see *Howlett*.

B.

> This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.
>
> *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (separate opinion, Jackson, J.)

If additional dimension is to be given the "temple" of *Hans v. Louisiana*, 134 U.S. 1 (1890), an edifice surely "leaning" perilously if not "collapsing", we urge two alternative blueprints:

(i) Except from the rigid requirements of *Atascadero* and *Will* those cases (like this one) where preceding decisions by this Court have squarely ruled upon the precise issue that a remedy does exist; or

(ii) Accommodate the statutory construction concept by holding that the remedy does exist where

> (a) Congress had the unquestioned power to subject states to a cause of action under the commerce power, and
>
> (b) a state (at least a state on notice of judicial interpretation that Congress has implemented the power to subject a state to a federally-created remedy) voluntarily engages in a pervasively regulated activity.

i

Stare decisis is preserved by acknowledging the continuing viability of *United States v. California, California v. Taylor, Petty, Parden, Welch* – and yes, *PATH*, as to "supremacy."

While we note the reluctance of the Court to overrule *Hans* because to do so would imperil numerous other subsequent decisions (*Welch*, 483 U.S. at 483-484, fn. 27), repudiation of the previous holdings construing the applicability of federal rail legislation would likewise not only leave injured workers remediless under the Jones Act/FELA but also would jeopardize the uniformity required to effectuate the goals of numerous statutes utilizing similar language as to the scope of applicability, including:

45 U.S.C. § 1-22 (Safety Appliance Acts)
45 U.S.C. § 23 (Boiler Inspection Act)
45 U.S.C. § 61-65 (Hours of Service Law)
45 U.S.C. § 71-73 (Animal Transit Law)
45 U.S.C. § 151-163 (Railway Labor Act)
45 U.S.C. § 231 (Railroad Retirement Act)
45 U.S.C. § 351-367 (Railroad Unemployment Act)
45 U.S.C. § 421-445 (Railroad Safety Act)

The state-operated railroads frequently serve the ports of this Country (*e.g., Parden*) and the South Carolina line before this Court is likewise involved. Recall that the state conveyed to the Public Railways Commission all of the operation previously conducted by the "port" railroad (*supra*, p. 7-8). Imagine the "parade of horribles" that would result from removal of a vital port operation from the provisions of the Railway Labor Act, for example, and the disastrous ripple effect of dismantling this comprehensive regulatory plan is obvious. [Each of the "safety" laws is specifically incorporated into the remedy of Jones Act/FELA, 45 U.S.C. §§ 53, 54. Also, see *Kernan v. American Dredging Co.*, 355 U.S. 426 (1959).]

Finally, due recognition should be accorded to the apparent acceptance by Congress of this Court's precedents in this field of law. None of the earlier rulings have been addressed by "curative" legislation. This was pointedly accentuated by Justice White's concurrence in *Welch* (483 U.S. at 495) as to the existence of a Jones Act/FELA remedy against state employers. The same acceptance by Congress of this Court's interpretations of FELA damages

has been cited, likewise, as apparent approval and acquiescence, *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 339 (1988).

ii

To accommodate this case with the post-*Atascadero* scrutiny test, we readily acknowledge our reliance upon the work of Professor Allen K. Easley in his Article, "The Supreme Court and the Eleventh Amendment: Mourning the Lost Opportunity to Synthesize Conflicting Precedents," found at 64 Denver Univ. L. Rev. 485 (1988) [Hereafter "Easley"].[8]

Recognizing a twofold study is required (*Welch*, 483 U.S. at 473), we interpret Justice White's concurring opinion as agreeing that Congress and this Court have answered the "whether" question in favor of applying Jones Act/FELA to the states while at the same time answering the "where" question by precluding such actions *in the federal courts*. The construction of one last story on the "temple" is suggested as a means to accomplish this result without toppling the temple.

Professor Easley postulates separate criteria for the "two distinct levels of congressional intent to be analyzed." (Easley, at 526) The first level is the "intent to abrogate" immunity; the second is the intent to provide a remedy "against consenting states" (Id.). (While we think it would well serve the "balance of federalism" to apply a

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[8] For his part, Professor Easley concedes his interpretation "is based largely" on the works of Professors Field and Fletcher. (Easley at p. 502, fn. 103).

less stringent scrutiny in determining "whether" a remedy exists than that scrutiny utilized in determining "where" that remedy may be enforced, the conceptual approach by Professor Easley is quite capable of being thus transposed if the Court is so inclined; accordingly, we will present the matter as he does.)

The Blueprint

(Easley, pp. 513-517, 524-526)

> Express consent overcomes immunity, independent of congressional authorization.
>
> Express authorization overcomes immunity, independent of state consent.
>
> If neither such consent nor authorization is explicitly stated, then these elements become "dependent variables."
>
> "Dependency" is created, constructively, when a state knowingly enters into a field where Congress has the authority to act *and* has acted towards a class into which the state falls as a result of its voluntary act.

As noted, we think it appropriate to utilize constructive consent whenever determining "whether" a statute applies, thus *never* exacting the same degree of specification needed in the determination as to "where" a suit may be brought. This would accord the Eleventh Amendment, as written, and *Hans*, as to its specific holding, a greater deference than that due to any implied immunity concept.

We acknowledge a reluctance to find "constructive consent" that will overcome the express constitutional limitation on the judicial power of the United States. See

Edelman v. Jordan, 415 U.S. 651, 673 (1974) [expressing concern relating to judicial power ramification]. But we suggest Professor Easley's approach is clearly more palatable as a means to accommodate the power of Congress to require that federally-created causes of action must be entertained in a *state's own courts*.[9]

Easley finds *Parden* to constitute the "minimum standard." By *Welch*, however, this Court has stated that "implicit" statutory language will not suffice to authorize the federal courts to assume jurisdiction over a state. A majority of the Court, however, did find an adequate basis for saying the breadth of the statute encompassed state activity in interstate commerce. Also, see *Union Gas*.

C.

Elimination of *Hans* from our jurisprudence may be the best answer. At the same time, we think our case can survive the *holding* in *Hans* (which we perceive to be: there is no federal court jurisdiction over a state that is sued by one of its citizens on a "federal question" cause of action). We here seek only to require a state to appear in its own courts in response to a "federal question" cause of action. As articulated, the holding of *Hans* is inapplicable. It is the gloss attached to *Hans* that gives

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[9] This Court has recognized the need for access to each forum, particularly where – because of other factors – federal jurisdiction may not exist. *Maine v. Theiboutot*, 448 U.S. 1, 11 fn. 12 (1990); a state may not impose barriers to the enforcement of federal legislation in state court where no such barrier exists in federal court. *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430 (1990); Also, see *Nevada v. Hall*, 440 U.S. 410 (1979).

rise to the twin-headed monster known as today's Eleventh Amendment. If the amplification of *Hans* into a "sovereign immunity" concept is eliminated, and the precedent properly limited to the arena of judicial power, we believe the result will be far more beneficial.

We have no new authorities or theories to advance on the wisdom of abandoning all or a portion of *Hans* and its gloss. The Eleventh Amendment cases in this Court from *Atascadero* to date, with their plethora of opinions and recitation of authorities, brilliantly demonstrate the problem and the need for one of the solutions we suggest.

Indeed, others of the Court may now join in Justice Scalia's observation in *Union Gas*, that 'tis "[b]etter to overrule *Hans*, I should think, than to perpetuate the complexities that it creates" (491 U.S. at 36, dissenting opinion).

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed, and this matter remanded for trial in the state courts of South Carolina.

Respectfully submitted,

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